STATE OF MICHIGAN

COURT OF APPEALS

DALE DUCKERT,

Plaintiff-Appellee,

v

GERALD DUCKERT and CYNTHIA DUCKERT,

Defendants-Appellants,

and

AGRIBANK,

Defendant.

UNPUBLISHED
September 25, 2003

No. 239952
Lapeer Circuit Court
LC No. 98-025693-CB

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Defendants Gerald and Cynthia Duckert[1] appeal a judgment in accordance with arbitrator Micheal L. Fassler's November 19, 2001 decision in which plaintiff Dale Duckert was deeded an undivided one-half interest in 154 acres owned by defendants' limited liability company, Phoenix Farms, LLC (Phoenix). We affirm.

I. FACTS

This appeal involves the dissolution of two partnerships, and the distribution of assets after dissolution. Plaintiff and defendant were partners in two family partnerships: Duckert Farm Property Company (DFPC), and Duckert Farms (DF). DFPC owned the family farm, and DF owned the business that maintained the farm.

After both partnerships filed for bankruptcy, the parties signed a quitclaim deed of foreclosure in favor of Agribank covering all of DFPC's farm property. Agribank began eviction proceedings but the parties reached a settlement in which defendants were granted the option to

[1] Cynthia Duckert was included as a party in this action as Gerald Duckert's wife. For clarity, the use of the term "defendant" throughout this opinion refers only to Gerald Duckert.

repurchase the property. Plaintiff filed the instant action alleging defendant breached his fiduciary duty by entering the agreement with Argribank granting defendants repurchasing rights rather than bestowing that right to DFPC.

Presumably because neither party had sufficient capital to repurchase the property, plaintiff found Strategic Properties, Inc. (Strategic) as a potential buyer for the property. Strategic obtained all of DFPC's property and quitclaim deeded 154 acres to Phoenix – defendant's new company – pursuant to the parties' agreement. The parties agreed to binding arbitration and the arbitrator concluded in part that plaintiff must be deeded an undivided one-half interest in the 154 acres then titled in Phoenix. The trial court entered a judgment in accordance with the arbitrator's opinion.

II. STANDARD OF REVIEW

We review arbitration awards for errors of law appearing on the face of the award. *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988), citing *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403. Errors of law are reviewed de novo. *In re Jude*, 228 Mich App 667, 670; 578 NW2d 704 (1998). This Court may modify, correct, or vacate an arbitration award under limited circumstances. MCR 3.602(J) and (K). "A reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Detroit Automobile Inter-Ins Exchange v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982).

III. EX PARTE COMMUNICATION

On appeal, defendants contend the arbitrator violated MCR 3.602 and MCL 600.5001 *et seq*., by participating in ex parte communications, and the arbitrator clearly erred by granting plaintiff an undivided one-half interest in the 154 acres. Generally, issues must be raised before and addressed by the trial court to be preserved for appeal. *Providence Hosp v Nat'l Labor Union Heath & Welfare Fund*, 162 Mich App 191, 194; 412 NW2d 690 (1987). This matter was arbitrated without a verbatim record; however, there is no indication that defendants' arguments were presented to the trial court or that the trial court considered these arguments. Therefore, defendants have failed to properly preserve these issues for appellate review.

Nonetheless, if we were to consider defendants' contentions, we would find no error by the trial court in entering a judgment in accordance with the arbitrator's opinion.

Defendants contend the arbitrator violated Canon 3(A)(4) of the Michigan Code of Judicial Conduct by engaging in improper ex parte communications with witnesses that occurred after the arbitrator's November 19, 2001 arbitration award but before his December 18, 2001 award modifications.

Under MCR 3.602(J)(1)(a), (b), and(c), an arbitrator's award may be vacated if it was procured through undue means, the arbitrator was evidently partial to one party, or the arbitrator exceeded his powers. Defendant contends the arbitrator's ex parte communication constituted prima facie partiality or bias. Generally, the party attacking the arbitrator's impartiality bears the burden of proof. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992).

In *Hewitt v Reed City*, 124 Mich 6, 8-9; 82 NW 616 (1900), the Court held an arbitrator's ex parte communication rendered the award void regardless whether it affected the arbitrator's partiality. The Court noted "[t]he rule is very strict in excluding any communication, made *ex parte* after the case is submitted; and when such communication, which may affect the result, is made, it is usual to enter into an inquiry with respect to whether the arbitrator was in fact influenced by it or not." *Hewitt*, *supra* at 8.

However, *Hewitt*, *supra*, is distinguishable from the instant case. In *Hewitt*, *supra*, the ex parte communication occurred before a decision was rendered. We note there is nothing indicating that the original November 19, 2001 decision here as anything other than a final opinion. As plaintiff notes, "The modifications to the original decision are more favorable to [defendants] than the original decision." Thus, clearly the alleged ex parte communications did not result in bias against defendants.

Although ex parte communications are generally prohibited during arbitration proceedings, *Hewitt*, *supra* at 8, it is unclear whether the parties' agreement in the instant case provided otherwise. According to plaintiff, the parties agreed to informal arbitration and the arbitrator "could talk with whoever he felt he needed to in order to obtain a full understanding of the matter." Conversely, defendant contends he had never "authorized the arbitrator to make any ex parte communications . . . ."

Without any evidence regarding the parties' arbitration agreement, we are unable to determine whether the communications constituted ex parte communications. Also, without an understanding of the parties' agreement, it is unclear whether the November 19, 2001 recommendation was intended as a final recommendation. However, because the decision regarding the undivided one-half interest in the 154 acres occurred before the alleged ex parte communications and remained unmodified thereafter, we find the trial court did not err by entering a judgment in accordance with the arbitrator's decision.

IV. ARBITRATOR'S DECISION

Defendants contend plaintiff's interest in the 154 acres was terminated when Agribank recorded the deed in lieu of foreclosure. However, by transferring their interests to Phoenix under the parties' agreement, defendants essentially acquiesced to the imposition of a constructive trust on their redemption rights from the settlement with Agribank.

In the instant case, the arbitrator's reasoning in formulating the award is not presented. As explained by the Court in *Detroit Automobile Inter-Ins Exchange*, *supra* at 428, a reviewing court may only act on a written record. However, "[t]here is no requirement that a verbatim record be made of private arbitration proceedings, there are no formal requirements of procedure and practice beyond those assuring impartiality, and no findings of fact or conclusions of law are required." *Id*. Thus, our ability to review an arbitration award is limited "to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Id*. at 429. An arbitration award is enforceable even if it grants relief which "could not or would not be granted by a court of law or equity in an ordinary civil action." MCL 600.5025; see MCR 3.602(J)(1).

In this case, we find no error of law on the face of the award. Therefore, the trial court did not err by entering a judgment in accordance with the arbitrator's decision.

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette